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No. 60

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

ROBERT W. JAFFKE, *Petitioner*

v.

WILLIAM C. DUNHAM, TRUSTEE OF THE ESTATE OF ROBERT L. KNETZER, BANKRUPT, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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"In one of the finest passages in judicial literature, Chief Judge Cardozo of the New York Court of Appeals—later Associate Justice of the United States Supreme Court—laid down the high standards that should be demanded of a trustee:

> "'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, *but the punctilio of an honor the most sensitive,* is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particualr exceptions. (Case cited.) Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.' (Emphasis supplied.)

> *"Imposed both by ethics and equity, these high standards are exacted of bankruptcy trustees as much as of other species of the genus."* (Emphasis supplied.)

Respondent's failure to come forward with any authority to support the Court of Appeals ruling on the cross-appeal issue is a convincing demonstration that the ruling is erroneous. Petitioner did not in the Court of Appeals and is not here attempting to increase the judgment in his favor in the district court. Petitioner seeks only to support that judgment. Respondent's implications to the contrary are unsupportable.

The argument found in Respondent's brief is substantially identical with that made before the district court. That court, having the benefit of observing the demeanor of the many witnesses while hearing their testimony, entered judgment against Respondent. It must be remembered that the district court found that the Petitioner had been defrauded and that finding was affirmed in the Court of Appeals (R. 182) notwithstanding Respondent's contrary assertion. Respondent's similar argument in the Court of Appeals succeeded in one aspect only, that Petitioner had not shown by a reasonable inference that Respondent held Petitioner's money, a success attributable to the failure of the court to consider all of the evidence.

Knetzer's written statement under oath should have been considered by the Court of Appeals. It was a declaration against interest when made. The cases relied on by Respondent here involve in each instance declarations not against interest because the declarant had parted with the property. Here the declaration was against interest not because Knetzer at one time held money defrauded from Petitioner but because the declaration subjected him to pecuniary liability both contractual and tortious. Clearly then the district court's judgment was correct and should be affirmed.

The argument that Petitioner was improperly permitted to testify (Resp. Br. p. 53) is fully and correctly answered by the decision of the Court of Appeals (R. 181-82). The mere fact that Respondent would make such an argument without cross-petition for certiorari completely undercuts Respondent's attempt to support the ruling of the lower court on cross-appeals.

CONCLUSION

The only just and proper disposition is to affirm the judgment of the district court. The affidavit which places Petitioner's funds in the hands of Respondent is clearly admissible. The appellate court erroneously failed to consider the statement because no cross-appeal was filed. It follows that the judgment of the trial court should be affirmed.

Respectfully submitted,

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